



Legal Update

January 2016

The SJC holds that information provided by a 911 caller along with other corroborating factors provided police with reasonable suspicion to conduct an investigatory stop of the defendant's vehicle!

Commonwealth v John Depiero, No. SJC-11893 (2016):

Background: An anonymous caller reported via 911 that there was a vehicle swerving all over the road in Cambridge. State Trooper John Dwyer (hereinafter referred to as "Trooper Dwyer") heard the broadcast, which included the fact that the registered owner of the vehicle was on probation for OUI, and stopped the vehicle after it passed him. The defendant, John Depiero, (hereinafter referred to as "Depiero") failed the field sobriety tests and was arrested for operating a motor vehicle while under the influence of liquor, second offense and operating a motor vehicle in violation of a license restriction. Depiero filed a motion to suppress arguing that the anonymous call was unreliable. The judge denied the motion and concluded that even though the 911 call was placed by "an ordinary citizen and not an informant, the citizen provided detailed information that would indicate the citizen had witnessed firsthand a motor vehicle driving erratically on the roadway."

Depiero was convicted after trial and he filed an appeal. The Appeals Court affirmed the denial of the motion to suppress on the grounds that the 911 caller's observations were reliable

because they were made “under the stress or excitement of a startling or shocking event,” which gave Trooper Dwyer reasonable suspicion to conduct an investigatory stop.

The SJC heard the case on further appellate review of the Appeals Court’s decision. The issue the SJC considered was whether Trooper Dwyer had reasonable suspicion to conduct an investigatory stop and whether Article 14 of the Massachusetts Declaration of Rights would reach a similar holding as the Supreme Court did in *Navarette v. California*, 134 S. Ct. 1683 (2014), and conclude that an anonymous 911 caller is reliable.

Conclusion: The SJC affirmed the denial of motion to suppress on different grounds than the Appeals Court. The SJC did not rely upon the “excited utterance” theory of reliability, but rather emphasized that the 911 call was reliable based on the officer’s corroboration of the driver’s location and also the added factor that the Depiero was on probation for a prior OUI offense. The SJC never addressed whether this investigatory stop would have been justified under the emergency aid doctrine.

1st Issue: Was the investigatory stop justified?

An investigatory stop is justified under Article 14 if the police have “reasonable suspicion based on specific, articulable facts and reasonable inferences that an occupant has committed, was committing or about to commit a crime.” See *Commonwealth v. Alvarado*, 423 Mass. 266 (1996). “A stop is lawful only if the Commonwealth establishes both indicia of reliability of the transmitted information and the particularity of the description of the motor vehicle.” *Commonwealth v. Lopes*, 455 Mass. 147 (2009). In the underlying case, the dispatch released information that contained a great level of detail such as the make, color, registration number and address attributed to the owner of the motor vehicle. The SJC held that whether Trooper Dwyer had reasonable suspicion to conduct an investigatory stop of Depiero’s motor vehicle hinged on whether the information released by the dispatch “bore sufficient indicia of reliability.”

2nd Issue: Was the caller reliable?

In order to establish reliability, the *Aguilar-Spinelli* test had to be applied as to whether the 911 caller in this case (1) had knowledge of the incident and (2) was reliable. With regard to the knowledge prong of the *Aguilar-Spinelli* test, the 911 caller provided an eyewitness account of what was happening and thus satisfied the knowledge prong. The caller informed dispatch that a vehicle was driving all over the road in a specific location in Cambridge. Additionally, the

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caller also gave the make and model of the vehicle. The level of detail established that the caller had personally observed Depeiro driving.

The second part of the SJC's analysis involved the veracity of the caller. Since the caller was anonymous, "there could be no evidence regarding the caller's past reliability or reputation for honesty." See *Commonwealth v. Anderson*, 461 Mass. 616, 622 (2012). The Commonwealth urged that the SJC adopt the recent Supreme Court decision in *Navarette v. California*, 134 S. Ct. 1683 (2014), where the Supreme Court held that the 911 emergency system by itself is an indicator of veracity. In *Navarette*, the Supreme Court reasoned that the 911 call system makes it easier to identify callers and prevent false reports. While laws in Massachusetts allow for prosecution of false 911 reports, the SJC stated that it was not inclined to attribute veracity to all 911 callers. "Even if the police are able to recover the telephone number and identify 911 callers, it proves absolutely nothing unless the anonymous caller is aware of that fact." "The caller in this case was aware that his call was being recorded; however there is no way to know whether the caller had reason to believe that he might be identified or that the telephone he was using may be traced to him, which could affect his behavior or veracity of the information he provided."

The SJC further held that they "decline to credit any indicia of reliability to the unidentified caller's information merely because the information was transmitted in the form of a 911 telephone call." The SJC did conclude that a 911 caller's reliability can be established "through independent corroboration by police observation or investigation of the details of the information provided by the caller." "Independent corroboration is relevant only to the extent that it was known to the police prior to the stop." See *Commonwealth v. Barros*, 435 Mass. 171 (2001).

Although one instance of driving erratically may not justify an investigatory stop, the facts in this case did warrant a stop. The anonymous caller's report that Depiero was "swerving all over the road" coupled with the information that he was currently on probation for a similar crime "was sufficient to permit Trooper Dwyer to stop Depiero's vehicle for further investigation even though "he did not personally see any suspicious behavior." Like *Commonwealth v. Gomes*, 453 Mass. 506, 511 (2009), where "knowledge of defendant's previous arrests on drug charges was a factor for consideration in justifying a stop," here "the police would have been remiss had they not conducted an investigative stop of the defendant's vehicle." *Commonwealth v. Anderson*, 461 Mass. at 625.

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